APPENDIX A.

Constitution of the United States.

ARTICLE IV.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

AMENDMENT XIV.

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . . nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Delaware Borrowing Statute.

10 Del. Code § 8120.

Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply..

Delaware Saving Statute.

10 Del. Code § 8117(a).

(a) If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient

service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within 1 year after the abatement or other determination of the original action, or after the reversal of the judgment therein.

Delaware Statute of Limitation.

10 Del. Code § 8118.

§ 8118. Personal Injuries.

No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained. As amended 52 Del. Laws, Ch. 339, § 2, eff. July 9, 1960.

Pennsylvania Statute of Limitation.

12 Purdon's Penna. Statutes Annotated § 34.

§ 34 Limitation in Cases of Personal Injury.

Every suit hereafter brought to recover damages for injury wrongfully done to the person, in case where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death the limitation of action shall remain as now established by law. 1895, June 24, P. L. 236; § 2.

APPENDIX B.

SUPERIOR COURT
STATE OF DELAWARE

George R. Wright
Associate Judge

Court House
Dover, Delaware

November 28, 1966

William D. Bailey, Jr., Esquire
Bayard, Brill, Russell & Handelman
Continental American Building
Wilmington, Delaware 19801

William Prickett, Esquire
Prickett & Prickett
1310 King Street
Wilmington, Delaware 19899

Re: Fromback v. Gilbert Associates, Inc.
CA 48, 1966

Gentlemen:

This is an action for personal injuries which resulted from an accident occurring in Pennsylvania.

The action was originally brought in the United States District Court for the District of Delaware. The action was dismissed there due to lack of jurisdiction.

The plaintiff then brought the action in this Court. The complaint indicates that the action was brought here more than two years after the plaintiff's cause of action arose but within one year after dismissal in the Federal Court. The defendant now moves for judgment on the pleadings or alternatively summary judgment.

The plaintiff is a resident of Pennsylvania. The defendant is a Delaware Corporation having its principal

place of business in Pennsylvania. These facts were clearly alleged in the complaint filed in the Federal Court and relied upon by the plaintiff in that Court as a basis of diversity jurisdiction. In fact, however, these facts result in both parties being Pennsylvanians for purposes of federal jurisdiction and the suit was therefore dismissed.

The question therefore is whether or not the plaintiff may escape the effect of 10 Del. C. § 8118 by invoking the provisions of 10 Del. C. § 8117(a).[1]

10 Del. C. § 8117(a) provides as follows:

> "(a) If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within 1 year after the abatement or other determination of the original action, or after the reversal of the judgment therein."

Responsible and intelligent arguments may be made in support of the position of either side. The most recent cases on the point are collected in 6 ALR 3rd 1043.

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1. The defendant makes an argument to the effect that if 10 Del. C. § 8117 is invoked it results in the Delaware Statute of Limitations (10 Del. C. § 8118) being extended for one year and therefore requires the application of the Pennsylvania Statute of Limitations in the case, since it would be shorter, because of the provisions of 10 Del. C. § 8120. This argument cannot be considered because defendant's present motion is based upon the premise that the Delaware Statute of Limitations applies.

The latest reported Delaware decision bearing on the matter appears to be *Gosnell v. Whetsel*, 198 A. 2d 924 (1964). That case as well as an earlier Delaware case [*Giles v. Rodolico*, 1 Storey 143, 140 A. 2d 263 (1958)] involved the application of 10 Del. C. § 8117(a) due to a defect in service of the writ commencing the action, however, the language of *Gosnell* indicates that the statute is not intended to be construed so narrowly.

The Federal Court action did not touch upon the merits of the case. Moreover, there is no prejudice to the defendant here in requiring it to defend the instant action on its merits at this time. The defendant knew well within the period of limitations that the plaintiff's intention to litigate the matter was serious.

The defendant's motion for judgment on the pleadings or for summary judgment is denied.

The defendant has also filed two other motions asking dismissal of certain paragraphs of the complaint.

Paragraphs 5(a), (e), (g), (h), (n), (o), and (q) of the complaint will be ordered stricken because they fail to satisfy the requirement of particularity of pleading contained in Rule 9(b) of the Superior Court Rules—Civil.

Likewise the prayer for prejudgment interest will be stricken.

The rule against the allowance of such interest is long established and well settled in this jurisdiction.

Order accordingly.

Very truly yours,

George R. Wright

s

cc: Judges of the Superior Court
Prothonotary
Mrs. Irma Whittington

APPENDIX C.

SUPERIOR COURT
STATE OF DELAWARE

December 9, 1966

GEORGE R. WRIGHT
Associate Judge

Court House
Dover, Delaware

William D. Bailey, Jr., Esquire
Bayard, Brill, Russell & Handelman
Continental American Building
Wilmington, Delaware 19801

William Prickett, Esquire
Prickett & Prickett
1310 King Street
Wilmington, Delaware 19899

Re: Fromback v. Gilbert Associates, Inc.
CA 48, 1966

Gentlemen:

The defendant has filed a motion for reargument in connection with the above matter.

I will assume the defendant is correct in stating in its motion that the argument that the Pennsylvania Statute of Limitations applies was not considered. I do not accept the defendant's theory that the Saving Statute has the effect of lengthening the Delaware Statute of Limitations. I view this statute as a statute granting relief under certain circumstances from the Delaware Statute of Limitations.

I therefore find no merit in the defendant's argument in this connection and its motion for reargument is denied.

Very truly yours,

GEORGE R. WRIGHT

s

cc: Prothonotary, New Castle County

APPENDIX D.

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM J. FROMBACH, *Plaintiff*, *v.* GILBERT ASSOCIATES, INC., *Defendant.*	CIVIL ACTION No.

CERTIFICATION TO THE SUPREME COURT ON A QUESTION OF LAW.

Pursuant to Rule 20 of the Rules of the Supreme Court, the Superior Court hereby certifies to the Supreme Court for its decision questions of law arising prior to the entry of final judgment:

The questions are certified to the Supreme Court under the following subsections of Rule 20(2):

(a) The questions of law to be certified are of first instance in this State.

(c) The questions of law to be certified relate to the construction and application of statutes of this State which have not been, but should be, settled by the Supreme Court.

(d) An interlocutory order of the Superior Court has been entered upon the determination by that Court of the questions to be certified, and a review of the interlocutory order may

(i) terminate the litigation or

(ii) avoid expenses and speed the determination of the cause.

A. Statement of the Nature of the Case.

This is a personal injury action resulting from a tort allegedly committed against a Pennsylvania resident in Pennsylvania by a Delaware corporation doing business in Pennsylvania.

B. Statement of the Facts Giving Rise to the Questions of Law Certified.

The plaintiff alleges he was injured in October, 1963 while employed upon a sewer development project in Terre Hill, Lancaster County, Pennsylvania. On August 28, 1964, the plaintiff sued Gilbert Associates, Inc., engineers, and James Julian, Inc., a contractor performing work upon the same project, both corporations of the State of Delaware, in the United States District Court for the District of Delaware (C.A. 2907).

After extensive discovery proceedings principally conducted by the plaintiff and defendant, Gilbert Associates, the action against James Julian, Inc. was dismissed by stipulation. Thereafter, in January, 1966, more than two years after the date of the commission of the tort, Gilbert moved for a dismissal for lack of diversity jurisdiction in the federal court by virtue of the fact that Gilbert had its principal place of business in Pennsylvania. This dismissal was granted.

Both the Pennsylvania and Delaware statutes of limitations for torts are two years (12 Purdon Pa. Stat. Ann. § 34; 10 Del. C., § 8118). Frombach brought an action on the same cause of action in the Delaware Superior Court.

Gilbert moved to dismiss the Superior Court action on the grounds that the Statute of Limitations had run.

Frombach pleaded the Delaware Savings Statute (10 Del. C., § 8117) alleging that the dismissal of the federal action for lack of jurisdiction allowed him one year from the dismissal of the action in the federal court within which to bring his cause of action in the Delaware State Court.

Pennsylvania has no applicable savings statute and Gilbert contended that:

The Savings Statute did not apply and even if it did the Delaware Borrowing Statute (10 Del. C., § 8120) barred the action because it would have been barred in Pennsylvania.

This motion was denied in an opinion attached hereto as Exhibit A.

Thereafter the defendant moved for reargument, which motion was, in turn, denied by this Court in an opinion attached hereto as Exhibit B.

On , 1967, this Court entered an order on its opinion denying the motion for summary judgment and the motion for reargument (Exhibit C).

C. A Concise Statement of the Questions of Law to Be Heard and Determined by the Supreme Court.

I. Does the Delaware Savings Statute (10 Del. C. Section 8117) apply in a case where a tort is committed in Pennsylvania, which has no equivalent Savings Statute, but where suit is timely brought in the federal court of Delaware, and is dismissed after the running of the Statute of Limitations (10 Del. C. Section 8118) for lack of diversity of citizenship jurisdiction?

II. If such right of action is preserved by the Savings Statute, does the Delaware Borrowing Statute (10 Del. C. Section 8120) bar the right of action if it arises out of a

tort committed in a jurisdiction having a two-year tort Statute of Limitations but no applicable Savings Statute?

III. Does Section (b) of the Statute (10 Del. C. Section 8117) preclude the defendant from raising the defense that the action has been barred by the running of the Statute of Limitations on appeal from a verdict rendered in favor of the plaintiff?

D. Reason or Reasons of the Court Below for Certification of the Questions to the Supreme Court.

The question presented is one of first impression in this State. The construction of several Delaware statutes are involved which have not previously been construed together. The Supreme Court should pass on the questions so that the law of the State of Delaware on this question will be known and, should the defendant prevail, the parties will be spared a lengthy and expensive trial.

E. Recommendation as to Order of Filing Briefs.

It is recommended that the defendant file the first brief.

/s/ Geo. R. Wright, *J.*

Approved as to Form:

/s/ Milton M. Borowsky,
Milton M. Borowsky, Esquire
Attorney for Plaintiff.

Prickett, Ward, Burt & Sanders,
Rodman Ward, Jr.,
Rodman Ward, Jr.,
Attorneys for Gilbert Associates.

(Opinion of the Superior Court and Order denying reargument, attached as exhibits, are not here reprinted, since they are printed hereinabove, as Appendix B and C, respectively.)

APPENDIX E.

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM J. FROMBACH,
Plaintiff,

v.

GILBERT ASSOCIATES, INC.,
Defendant.

No. 42, 1967.

(November 10, 1967.)

WOLCOTT, *Chief Justice;* CAREY, *Justice;* and SHORT, *Vice-Chancellor,* sitting.

Arthur Inden, of Young, Conaway, Stargatt & Taylor, Wilmington; Milton M. Borowsky, of Freedman, Borowsky and Lorry, of the Pennsylvania Bar, for plaintiff.

William Prickett and Rodman Ward, Jr., of Prickett, Ward, Burt and Sanders, Wilmington, for defendant.

CAREY, *J.:*

This case comes to us upon certification by the Superior Court. We accepted it because the questions raised are of first impression in Delaware and a determination in defendant's favor will terminate the case, thus avoiding a lengthy and expensive trial.

The questions certified are these:

"I. Does the Delaware Savings Statute (10 Del. C. Section 8117) apply in a case where a tort is com-

mitted in Pennsylvania, which has no equivalent Savings Statute, but where suit is timely brought in the federal court of Delaware, and is dismissed after the running of the Statute of Limitations (10 Del. C. Section 8118) for lack of diversity of citizenship jurisdiction?

I. If such right of action is preserved by the Savings Statute, does the Delaware Borrowing Statute (10 Del. C. Section 8120) bar the right of action if it arises out of a tort committed in a jurisdiction having a two-year tort Statute of Limitations but no applicable Savings Statute?

III. Does Section (b) of the Statute (10 Del. C. Section 8117) preclude the defendant from raising the defense that the action has been barred by the running of the Statute of Limitations on appeal from a verdict rendered in favor of the plaintiff?"

The action is a suit brought by a resident of Pennsylvania based upon alleged negligence which caused bodily injuries to the plaintiff. Those injuries were sustained in October, 1963 in Pennsylvania. Suit was first instituted in the Federal District Court for Delaware against the present defendant and another corporation. After extensive discovery proceedings, by stipulation the case was dismissed as to the other defendant. That dismissal deprived the Federal Court of its diversity jurisdiction and, on motion of defendant, the action was dismissed entirely in 1966. The plaintiff promptly commenced the present suit, and defendant moved for a dismissal on the ground that it is barred by the statute of limitations. The Court below denied the motion but filed this certification.

T. 10 Del. C. § 8118 bars actions for personal injuries after two years from the sustaining thereof. T. 10 Del. C. § 8117(a) reads as follows:

"(a) If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within 1 year after the abatement or other determination of the original action, or after the reversal of the judgment therein".

T. 10 Del. C. § 8120, our Borrowing act, reads as follows:

"Where a cause of action arises outside of this State, an action can not be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply".

The parties are in apparent agreement as to certain principles: (1) limitations of actions are determined by the law of the forum; (2) our Borrowing statute requires that Pennsylvania law be looked to as setting the time limit for the bringing of the action, if that period is shorter than the Delaware period; (3) the length of time allowed by Penn-

sylvania is two years from the date of the accident; (4) Pennsylvania's Savings Statute would not toll its limitation under the facts of this case.*

We will assume, without deciding, that plaintiff is correct in certain of his contentions under question No. I. We thus accept his argument that the commencement of a suit in the Federal District Court for Delaware is equivalent to one brought in our Superior Court, within the meaning of our Savings statute (§ 8117); that the reason for dismissal of the Federal Court action is within the scope of that section; and that, therefore, if the tort had occurred in Delaware, the present suit would not be barred. We refrain from deciding those contentions because of our views concerning the Borrowing statute.

Plaintiff argues under question II that, under the assumptions we have made, § 8117 permits the bringing of this second suit because the only prerequisite to the application of that section is that the prior suit be brought within the proper time and later dismissed for one of the reasons therein listed; and, if that prerequisite exists, the new suit is permissible, wherefore § 8120 has no application. We think the opposite conclusion is required by the history of the act, its purpose, and the decisional law.

The Savings statute has been a part of Delaware law, with no change presently significant, since 1829. 7 Del. L. 166. At that time, we had no Borrowing statute; § 8120 was not enacted until 1947. 46 Del. L. 689. Any inconsistency or conflict between those two sections would ordinarily be resolved in favor of the latter one, under the theory of implied amendment or partial repealer. The legislators in 1947 must have been aware of § 8117; if they had

* The Pennsylvania Savings Act (12 Purdon's Pa. Stat. Ann. § 33) applies only where a judgment s reversed or where judgment is entered against the plaintiff after a verdict in his favor.

intended to except from § 8120 cases brought under the authority of § 8117, they could easily have said so. Their failure to set forth any such exception naturally leads to the conclusion that they intended none. Cf. *Glassberg v. Boyd*, 35 Del. Ch. 293, 116 A. 2d 711.

The purpose of § 8120 was discussed in *Pack v. Beech Aircraft Corp.*, 11 Terry 413, 132 A. 2d 54. This Court said:

> "It is . . . ., an act to prevent 'forum-shopping'. If a non-resident chooses to bring a foreign cause of action into Delaware for enforcement, he must bring the foreign statute of limitations along with him if the foreign statute prescribes a shorter time than the domestic statute" . . . .
>
> "On its face, therefore, the general purpose of the statute is to shorten the period of limitation applicable to actions arising in foreign jurisdictions if the foreign statute specifies a shorter period; with a proviso, however, that the rights of a certain class of residents shall be unaffected by the change. Such, we think, is the clear and obvious meaning of the statute".

Similar reasons were assigned in *Cope v. Anderson*, 67 S. C. 1340, 331 U. S. 461. The method of accomplishing that purpose and the extent to which it applies are matters for legislative determination within constitutional bounds. We have no basis for saying that the present suit does not come within the object which our Legislature sought to accomplish, or that it is not within the bounds which it intended to prescribe; we cannot create an exception which the lawmakers did not see fit to prescribe. *Lewis v. Pawnee Bill's Wild West Co.*, 5 Penn. 397, 61 A. 868, affd. 6 Penn. 316, 66 A. 471.

Decisions elsewhere have held under various types of Borrowing statutes that, in determining whether an action

is barred in the state where the cause arose, the Court looks not to its own Savings act, but to that of the situs. The theory is that the borrowed statute is accepted with all its accoutrements. *American Surety Co. v. Gainfort,* 219 F. 2d 111; *Wilt v. Smack,* 147 F. Supp. 700; *Hilliard v. Pa. Railroad Co.,* 73 F. 2d 473; *McGrath v. Helena Rubenstein, Inc.,* 29 F. Supp. 822; *Momand v. Universal Film Exchanges,* 172 F. 2d 37; *Farrell v. Employer's Liab. Assur. Corp.,* 190 A. 466, 474. There are cases taking the opposite view. *Payne v. Kirchwehm,* 48 N. E. 2d 224; and *Wright v. New York Underwriter's Ins. Co.,* 1 F. Supp. 663, are examples. We do not accept the latter rule for the simple reason that we do not understand how we can determine the "time limited by the law" of the foreign state without including any exception which exists to the limitation rule of that state.

In the present case, concededly the Pennsylvania act would not toll its limitation under the circumstances here. We are, therefore, of the opinion that the suit is barred under our Borrowing statute since the time limit in that state is shorter than the Delaware limit.

A final argument must be considered. Plaintiff contends that T. 10 Del. C. § 8117(b) prevents this Court from reviewing the ruling which the Superior Court made in his favor. The paragraph reads as follows:

> "If in the original action, the benefit of this chapter is pleaded, and a verdict upon such defense is found for the plaintiff, such verdict shall be conclusive evidence that the original action was commenced within the time limited therefor."

Plaintiff reads the words "original action" as referring to the present suit. This is not correct. All of § 8117 deals with the bringing of a new suit after dismissal of a prior one. Clearly, § 8117(b) refers to a decision made in

the first suit which is the "original action". The paragraph is designed to prevent a defendant from raising, in the second suit, the argument that the first one was brought too late, where that very question was pleaded in the first suit and a verdict on the point rendered in the plaintiff's favor. The paragraph has no application whatever to the present case.

Assuming, without deciding, that our answer to question No. I would be "Yes", our answer to question No. II is "Yes"; our answer to No. III is "No".

The order entered below must be reversed and a dismissal directed.

APPENDIX F.

SUPREME COURT OF DELAWARE

T. E. Townsend, Jr.
Clerk

Old State House
Dover, Delaware

November 28, 1967

Arthur Inden, Esquire
Bank of Delaware Building
Wilmington, Delaware

William Prickett, Esquire
Box 1328
Wilmington, Delaware

Re: Frombach v. Gilbert Associates, No. 42, 1967

Dear Sirs:

This letter to notify you that the Court has denied the petition for reargument in the above case. An Order will be sent to the court below shortly.

Yours very truly,

T. E. TOWNSEND, JR.

APPENDIX G.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM J. FROMBACH *v.* GILBERT ASSOCIATES, INC.	No. 42, 1967

ORDER.

AND NOW, TO WIT, this 29th day of November, 1967 this Court having approved the above proceeding on certification instituted in the Superior Court in and for New Castle County, by virtue of which proceeding the following questions of law were certified for hearing and determinations:

"1. Does the Delaware Savings Statute (10 Del. C. § 8117) apply in a case where a tort is committed in Pennsylvania, which has no equivalent Savings Statute, but where suit is timely brought in the Federal Court of Delaware and is dismissed after the running of the Statute of Limitations (10 Del. C. § 8118) for lack of diversity of citizenship jurisdiction?

2. If such right of action is preserved by the Savings Statute, does the Delaware Borrowing Statute (10 Del. C. § 8120) bar the right of action if it arises out of a tort committed in a jurisdiction having a two-year tort Statute of Limitations but no applicable Savings Statute?

3. Does Section (b) of the Statute (10 Del. C. § 8117) preclude the defendant from raising the defense that the action has been barred by the running

of the Statute of Limitations on appeal from a verdict rendered in favor of the plaintiff?"

IT IS ORDERED:

The first certified question is unanswered.

The second certified question is answered in the affirmative.

The third certified question is answered in the negative.

The order of the Court below entered April 19, 1967 is reversed insofar as it denies defendant's motion for summary judgment and the Court below is directed to enter judgment in defendant's favor, pursuant to the opinion of this Court dated November 10th, 1967.

IT IS FURTHER ORDERED that the Clerk of this Court transmit to the Clerk of the Superior Court in and for New Castle County a certified copy of this order together with a certified statement of the costs in this Court to be taxed as a part of the costs below.

DANIEL F. WOLCOTT, *C. J.*

JAMES B. CAREY, *J.*

ISAAC D. SHORT, II, *V. C.*